SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-97

SEP 14

SALVATORE ORLANDO,

Petitioner,

—v.—

MELVIN LAIRD, individually and as Secretary of Defense of the United States: and STANLEY R. RESOR, individually and as Secretary of the Army of the United States,

Respondents.

DOUGLAS KAPLAN,

Petitioner,

—v.—

MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY R. RESOR, individually, and as Secretary of the Army of the United States, and MAJOR GENERAL WALTER M. HIGGINS, Commanding General, Fort Hamilton, Brooklyn, New York, Commanding Officer, Overseas Replacement Station, Fort Dix, New Jersey.

Respondents.

PETITIONERS' REPLY MEMORANDUM FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The government's short memorandum in opposition does not meet any of the issues presented in the petition for certiorari. Furthermore, the government's position stands in direct contradiction to this Court's established constitutional role as final arbiter of authority between the executive and legislative branches.

1. The government claims in its opposing memorandum that this Court should not examine the issues of the Vietnam war because the "President should not be hemmed in by the prospect of judicial supervision in the exercise of these powers. . . . A President violates the constitutional powers of Congress . . . at his peril—and Congress is the best judge of whether there has been a violation. This is an issue which should be resolved by the Congress and the Executive, and not by the judiciary" (p. 6). What the government is saying is that the judiciary can never examine into the Executive's exercise of its powers, particularly its war powers, if the question at issue is whether the President has encroached upon Congressional prerogatives granted by the Constitution. For in that situation Congress is "the best judge of whether there has been a violation" of its Constitutional powers. Therefore only Congress can ever question or restrict the Executive's exercise of its asserted constitutional powers if it invades Congress's domain.

2. The government's position would do away with one of the most important functions of the federal judiciary, indeed with the very purpose for which it was instituted.[1]

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[1] Any Executive usurpation of authority will have its most immediate impact upon the civil liberties of the citizens whom the federal courts were established to protect. It is not Congress's authority that the courts are asked to vindicate but the personal rights of the citizens—such as the two soldiers involved in the instant case. James Madison stated when he introduced the Bill of Rights into Congress: "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights [in the Bill of Rights]; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment of rights expressly stipulated for in the Constitution by the declaration of rights." 1 *Annals of Congress*, 1st Cong., 1st Sess. 439.

From the earliest period of our history, the federal courts have questioned the assertion of the President's war powers to determine whether it comported with the constitutional grant and whether the President was invading the war powers granted to Congress. In *Little* v. *Barreme*, 2 Cranch 170 (1804) this Court held that the President had exceeded the war powers granted to him by Congress in authorizing certain seizures on the high seas and the captain of an American vessel acting under Presidential orders had to answer in damages. In *Ex parte Milligan*, 4 Wall. 2 (1866), this Court rejected the Executive's attempt to establish military courts to try civilians when the civil courts were open and operating. In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946) this Court held that Congress had not granted the President power to establish military courts to try civilians in Hawaii and the President had no inherent authority to do so. In *Ex parte Endo*, 323 U.S. 283 (1944), this Court held that Congress had not authorized the President to keep admittedly loyal Japanese-Americans in detention camps and that the President could not establish such camps without the authorization of Congress. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) this Court held that the President's war powers did not extend to permitting him to seize the steel mills of the nation without Congressional authorization. And in *Greene* v. *McElroy*, 360 U.S. 474 (1959) this Court held that the President could not establish a national security program for defense plants without Congressional approval of the procedures.[2]

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[2] In *New York Times Co.* v. *United States*, 39 LW 4879 (June 30, 1971) five members of this Court considered the absence of specific Congressional legislation authorizing injunctive relief as

3. The question in every one of these cases was precisely the same as that before this Court in the instant matter, namely what is the extent of the President's war powers under the Constitution and what can the President do with or without explicit Congressional authorization. But no claim was made in these cases that since the President was allegedly encroaching upon Congress's war powers, only Congress could decide the issues in dispute. And this Court never refused to examine the Constitutional questions at stake on that basis.

4. In numerous analogous situations this Court has inquired into the extent of the Executive's powers under the Constitution to see whether Congressional authorization was required before it could take certain steps later challenged by a citizen. The power of a President to enter into foreign agreements outside of the Senate's treaty power was examined in *United States* v. *Belmont*, 301 U.S. 324 (1937) and *Tucker* v. *Alexandroff*, 183 U.S. 424 (1902).

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a significant factor in denying an injunction against publication of the so-called Pentagon papers. "It would, however, be utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. . . . The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret law. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive can 'make law' without regard to the action of Congress." (Marshall, *J.*, concurring) 39 LW at 4888. See also *Durand* v. *Hollins*, 3 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860) where a justice of this Court sitting on circuit held that the President had the right to send naval ships to protect American citizens abroad without Congressional authorization. In the *Prize Cases*, 2 Black 635 (1863), this Court upheld President Lincoln's blockade of Southern ports during the Civil War before Congress had the opportunity to authorize his moves.

The President's right to discharge governmental officials without Congressional approval was examined in *Myers* v. *United States*, 272 U.S. 52 (1926) and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). The President's power to seize lands without the approval of Congress was challenged in *United States* v. *Lee*, 106 U.S. 196 (1882). The power of the President to withdraw public lands from sale without the authorization of Congress was examined in *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). The President's power to obtain an injunction to protect the mail without an authorizing act by Congress was the issue in *In re Debs*, 158 U.S. 564 (1895).[3]

5. The issue in the above cases was also the one presented here: had the President encroached upon Congress's power under the Constitution and could he act as he did without Congressional sanction. It is the function of this Court not only to decide on the allocation of constitutional power between the government and the people and between the national and state governments, but also between the President and Congress. Almost every assertion of Presidential power will involve an infringement on the rights of Congress under the Constitution. For the government to say that in such cases only Congress can decide the question is to deny this Court's role as umpire of the constitutional separation of powers which has been firmly established in our history.

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[3] In related cases the power of Congress to order disbursements by Executive officials was decided in *Kendall* v. *United States*, 12 Pet. 524 (1838). The power of Congress to delegate legislative authority to the President in the economic sphere was examined in *Schechter Corp.* v. *United States*, 295 U.S. 495 (1935).

6. The Second Circuit and both district courts below rejected this contention of the government and held that the courts must examine the legal issues of the war and the allocation of the war powers between Congress and the Executive. The Second Circuit said:

> "We held in the first *Berk* opinion [*Berk* v. *Laird*, 429 F.2d 302 (2nd Cir. 1970)] that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine." *Orlando* v. *Laird*, 443 F.2d 1039, 1042 (2nd Cir. 1971).

In the district court Judge Dooling said:

> ". . . determining whether or not a political decision has been taken by the appropriate set of governmental acts inescapably presents a purely judicial question when the existence or non-existence of a valid political authorization as the source of a particular command is drawn in question by one directly affected by it in his individual liberty as a citizen. . . . [If a court decides against the government], the only consequence can be resumption of conformity to constitutional norms of political conduct to achieve, dilute, deflect or reverse the desired political objectives." 317 F. Supp. at 1016.

The government now asks this Court to deny certiorari on a ground explicitly rejected by the court whose judgment is challenged.

7. The key issue on this appeal is one which this Court has never examined but which lies at the heart of the Constitutional allocation of the war power: How does this nation go to war? Can the President move the nation from a state of peace into a state of war on his own authority or is an explicit legislative act authorizing war necessary? What is Congress' role in the decision to go to war in this modern age? Is the burden in Congress on those who wish to start a war or on those who wish to stop it? It is no exaggeration to say that the security of the nation in the coming decades depends on the answer to these questions and that the legitimacy of any military action by the government will be called into question by the citizenry unless and until these questions are authoritatively answered.

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

DOMINIC ABBATIELLO , being duly sworn, deposes

and says. that on the 15th day of SEPT. 19 71, at 2 o'clock

P. M. he served the annexed PETITIONERS' REPLY MEMORANDUM FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT NO. 71-97

upon Hon. Erwin N. Griswold, Solicitor General of the United States

Esq(x)., Attorney(x)

for RESPONDENTS

by depositing 3 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station. New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(x) at (his/~~their~~) office

DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

that being the address designated in the last papers served herein by the said attorney.

MICHAEL H.
Notary Public, State of New York
No. 41-0126718
Qualified in Queens County
Commission Expires March 30, 1972

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In The

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October Term, 1971

No. 71-97

Salvatore Orlando and Douglas Kaplan,
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vs.

Melvin Laird, et al.,
Respondents

AMICUS CURIAE MEMORANDUM ON PETITION FOR CERTIORARI

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September 1971

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

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Salvatore Orlando and Douglas Kaplan,
Petitioners

vs.

Melvin Laird, et al.,
Respondents

AMICUS CURIAE MEMORANDUM
ON PETITION FOR CERTIORARI

Interest of Amici

Amici are United States Congressmen, state legislators, state attorneys general, and a governor who are extremely concerned about the effect of the Vietnam war upon American society.* As elected

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*The parties have consented to the filing of this MEMORANDUM. Pursuant to Rule 39(4) of the Court's rules, the MEMORANDUM has been produced by xerography. Rule 39(4) explicitly says that "Printing, as the term is used in these rules, shall include any process capable of producing a clear black image on white paper but shall not include ordinary carbon copies." (Emphasis added.) Xerography falls four square within the wording of the rule because it is a process capable of producing a clear black image on white paper. More-

officials of the people they have an interest in insuring that the allocation of power established by the Constitution, which they are sworn to uphold, is followed by the Executive branch of the federal government in the area of war and peace. Amici are also interested in insuring that great constitutional questions which divide and agitate their constituencies are settled by the proper organs of government. Amici feel that the question of the legality of the Vietnam war is one of the most troublesome and disturbing issues of our times, and has greatly troubled the people they represent. Therefore, Amici support efforts to have the courts settle the matter of whether the war is legal or illegal.

Reasons For Granting The Writ

The Vietnam war has divided and agitated America more than any question of the last thirty years. This has happened not only because many citizens question the wisdom of our military moves in Southeast Asia, but because millions of Americans doubt whether the proper constitutional forms have been followed in the initiation and escalation of American military involvement in Vietnam. This has had the effect of making many of our citizens question the legitimacy of our efforts in Vietnam. Not only is this war in doubt, but future military efforts of our government may be called into question unless the limits and powers of the government to wage war are definitively settled

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over, xerography is convenient, speedy, and helpful to parties who have a vital stake in the upholding of constitutional principles but lack the deep pocket necessary for commercial printing.

by the courts who have the final responsibility of defining the allocation of power under the Constitution. Without intimating any view on how we feel this Court should rule on the question, Amici urge this Court to accept certiorari in this action so that these profound constitutional questions may be settled.

Respectfully submitted,

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Attorney for Amici

The following public officials are the Amici who join in this AMICUS MEMORANDUM:

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Member of Congress

MICHAEL HARRINGTON,
Member of Congress

DON EDWARDS,
Member of Congress

HERMAN BADILLO,
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LES ASPIN,
Member of Congress